



**In the Missouri Court of Appeals
Eastern District
DIVISION THREE**

BEVERLY BREWER,)	No. ED92569
)	
Respondent,)	
)	Appeal from the Circuit Court
vs.)	of the City of St. Louis
)	08SL-CC01752
MISSOURI TITLE LOANS, INC.,)	
)	Honorable David L. Dowd
Appellant.)	
)	Filed: December 8, 2009

Before Glenn A. Norton, P.J., Mary K. Hoff, J. and Lawrence E. Mooney, J.

OPINION

Missouri Title Loans, Inc. appeals the judgment finding a class arbitration waiver contained in its loan agreement unconscionable and unenforceable. We affirm.

I. BACKGROUND

Beverly Brewer went to Missouri Title Loans to borrow \$2,215.00. In obtaining the loan she signed a loan agreement, promissory note, and security agreement. The loan was secured by the title to Brewer's 2003 Buick Rendezvous. The finance charges for the thirty-day loan were \$564.37, which translated to annual percentage rate of roughly 300 percent. The loan agreement contained language purporting to require individual arbitration and waive Brewer's right to class arbitration, among other things. Brewer filed a class action petition against Missouri Title

Loans¹ based on the company's trade practices in issuing loans. She alleged violations of numerous statutes and the Missouri Merchandising Practices Act. Missouri Title Loans filed a motion to dismiss or to stay the claims and compel Brewer to arbitrate her claims individually based on the language in the loan agreement. After a hearing, the trial court ultimately entered judgment partially granting Missouri Title Loans' motion and ordering that the matter proceed to arbitration to determine whether the claim meets the criteria for class arbitration. In its judgment, the trial court found the class arbitration waiver in the loan agreement unconscionable and unenforceable. The trial court found no just reason for delay and denominated its judgment final for purposes of appeal. Missouri Title Loans now appeals.

II. DISCUSSION

A. Standard of Review

Here, the trial court heard evidence on the record at a hearing on Missouri Title Loans' motion. Thus, our review is the same as in any other court-tried case – we affirm the decision unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, 94 (Mo. App. E.D. 2008). In addition, our review of the arbitrability of a dispute is de novo. *Id.* "Missouri contract law applies to determine whether the parties have entered a valid agreement to arbitrate." *Id.*

B. There was Sufficient Evidence to Support the Trial Court's Conclusion of Unconscionability

In its first point on appeal, Missouri Title Loans argues there was insufficient evidence to

¹ Althea Peete and Anthony Pipken were also named as plaintiffs in the original filing; however, Peete and Pipken subsequently dismissed their claims and Brewer proceeded with the action.

support the trial court's finding that the class arbitration waiver was unconscionable. There are procedural and substantive aspects of unconscionability. *Woods*, 280 S.W.3d at 94. Procedural unconscionability generally focuses on the contract formation process. *Id.* at 95. It concerns factors such as high pressure exerted on the parties, misrepresentation, or unequal bargaining positions. *Id.* Substantive unconscionability refers to undue harshness in the contract terms themselves. *Id.* There must be both procedural and substantive unconscionability before a provision can be considered unenforceable; however, there can be a balancing of the two aspects of unconscionability. *Id.* If gross procedural unconscionability exists, not much evidence is required of substantive unconscionability and vice versa. *Id.*

1. There was Sufficient Evidence of Procedural Unconscionability

Missouri Title Loans argues there was insufficient evidence of procedural unconscionability because there was no pressure or misrepresentation used to force Brewer to obtain the loan from Missouri Title Loans.² In response, Brewer relies upon our Court's analysis in *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90 (Mo. App. E.D. 2008) to argue there was sufficient evidence of procedural unconscionability. The *Woods* case is instructive. In *Woods*, our Court considered whether a class arbitration waiver provision contained in payday lender's loan contract was unconscionable. *Id.* As in the present case, with respect to evidence of procedural unconscionability, the lender in *Woods* argued it did not use misrepresentations or other pressure to induce Woods to sign the contract, and therefore there was no evidence of procedural unconscionability. *Id.* at 95. The Court responded to the lender's argument by emphasizing that the bargaining position of the parties was an important consideration regarding procedural unconscionability. *Id.* at 96. The Court concluded the lender was in a superior

² Missouri Title Loans also relies heavily on *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. banc 2006) to argue there was insufficient evidence of procedural unconscionability. We find the Court's holding in *Vincent* is inapplicable to facts of this case.

bargaining position because the contract was presented on a take it or leave it basis in a situation where people were borrowing money at a high interest rate. *Id.* As a result, there was sufficient evidence to support a finding of procedural unconscionability. *Id.*

Here, the loan agreement was presented in a take it or leave it fashion, as the agreement in *Woods* was. In addition, as in *Woods*, there was evidence in this case that Missouri Title Loans was in a much superior bargaining position. *See Woods*, 280 S.W.3d at 96. Missouri Title Loans is a large company with fifty stores in Missouri. Brewer is an individual seeking to borrow money with applicable finance charges amounting to a high interest rate. During the hearing before the trial court, Terry Fields, the designated corporate representative for Missouri Title Loans, testified customers cannot negotiate the terms of the arbitration clause in the loan agreement. The waiver at issue here is contained in a form contract presented to the borrowers, and as stated above, cannot be negotiated. Given the positions of the parties and considering the evidence discussed above, Missouri Title Loans was in a far superior position than Brewer with regard to the loan agreement. Because the lender was in a superior bargaining position, the contract was presented on a take it or leave it basis, and Brewer was borrowing money at what amounted to a high interest rate, here, as in *Woods*, there was sufficient evidence of procedural unconscionability. *See Woods*, 280 S.W.3d at 96.

2. There was Sufficient Evidence of Substantive Unconscionability

Missouri Title Loans also claims the evidence did not support the trial court's finding of substantive unconscionability. According to Missouri Title Loans, the trial court improperly concluded the class arbitration waiver was substantively unconscionable based on practical considerations concerning representation and notice. We disagree.

The Court in *Woods* also considered evidence of substantive unconscionability. 280 S.W.3d at 96. The *Woods* Court noted we are to consider the "reasonable expectations of the average consumer" when evaluating a form contract such as the loan agreement at issue here. *Id.* "Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed at the time the contract was made." *Id.* If the contract terms are so one-sided as to be oppressive, or there is an overall imbalance in the rights and obligations imposed, substantive unconscionability is indicated. *Id.* The Court in *Woods* considered the class action waiver and arbitration provision substantively unconscionable based upon the limitation it placed upon Woods's ability to attract counsel to pursue a cause of action, effectively leaving the consumer with no meaningful avenue of redress. *Id.* at 97, 98. This Court stated that by prohibiting class arbitration, the lender bars customers from joining together to seek relief that would be impractical for them to obtain individually. *Id.* at 98. As such, there was sufficient evidence to support a finding of unconscionability. *Id.* at 99.

Here, there was significant evidence presented concerning the fact that individual claims pursuant to the loan agreement would not be likely to attract counsel. John Ammann, a professor from St. Louis University School of Law, testified as an expert on behalf of Brewer. According to Ammann, it would be very hard, "if not impossible" for a consumer to find counsel to handle a claim under the loan agreement because it is a complicated area of law. Such a claim would require significant expertise and discovery, and therefore it would not be financially viable for an attorney because of the complicated nature of the case and the small damages at issue. Bernard Brown, another expert testifying on behalf of Brewer, stated it would be a problem for consumers to obtain representation for individual claims. Brown testified it would be "exceedingly difficult," if not "outright rare" to find representation for individual claims.

According to Brown, the arbitration waiver provision was a "major impediment" to individual claims pursuant to the loan agreement. Finally, Dale Irwin, a third expert, opined that the likelihood of an individual finding an attorney to represent him or her was "virtually nil" because of the small damages and the likelihood of a "heavily defended" defendant, such as Missouri Title Loans. As a result of the expert testimony, there was sufficient evidence to establish that the arbitration waiver would likely limit accessibility to representation for individual claims against Missouri Title Loans.³ Therefore, there was sufficient evidence to support the trial court's conclusion that the provision was substantively unconscionable.

3. Conclusion

There was sufficient evidence of both procedural and substantive unconscionability to support the trial court's conclusion that the class arbitration waiver was unconscionable and unenforceable. Point one is denied.

C. The Trial Court's Decision was not Preempted by the Federal Arbitration Act

In its second point on appeal, Missouri Title Loans claims the Federal Arbitration Act ("FAA") preempts the trial court's decision because the court's finding that the waiver was unconscionable was not based upon grounds existing in law or equity for the revocation of any contract. We disagree.

Missouri law is clear that state law contract defenses, such as unconscionability, may be used to invalidate arbitration agreements without contravening the FAA. *Swain v. Auto Services*,

³ We note that in the *Woods* case, this Court recited the lender's argument that the trial court's decision relied "in large measure" upon experts' testimony that they would not take a case with damages as small as Woods's. 280 S.W.3d at 98. The Court noted it was not convinced the trial court relied "in large measure" upon such testimony, and stated regardless, it did not. *Id.* In the present case, the evidence supporting a finding of substantive unconscionability was largely established by expert testimony. However, the testimony supporting a finding of unconscionability in this case was not about what the individual experts themselves would or would not do. Instead, the experts testified as to what their opinion was regarding what other counsel would generally do and provided specific reasons for those opinions.

Inc., 128 S.W.3d 103, 107 (Mo. App. E.D. 2003). Thus, Missouri Title Loans's argument fails, and point two is denied.

D. The Class Arbitration Waiver Improperly Immunized Missouri Title Loans from Liability

In its third point on appeal, Missouri Title Loans argues that to the extent the class arbitration waiver functions as an exculpatory clause, it is not prohibited as against public policy because it is clear and unambiguous and there is no surprise advantage.

In *Woods*, the Court concluded that because the waiver served to immunize the loan company from liability, the exculpatory language could not be enforced against the borrower. 280 S.W.3d at 99. Similarly here, the language of Missouri Title Loans' class arbitration waiver serves to effectively immunize it from liability, and therefore, pursuant to the holding in *Woods*, such exculpatory language should not be enforced. Point three is denied.

E. The Loan Agreement Improperly Prohibits Class Arbitration

In its fourth and final point on appeal, Missouri Title Loans argues the trial court erred in finding the class arbitration waiver unconscionable and unenforceable because it does not attempt to prohibit arbitrations when in fact the loan agreement requires arbitration.

The argument in Missouri Title Loans's brief with respect to Point IV consists of three sentences with no citation to any authority. Essentially, Missouri Title Loans appears to claim the class arbitration waiver did not prohibit arbitration because it required arbitration. However, this argument ignores the fact that *class* arbitrations are prohibited by the language in Missouri Title Loans' agreement. As discussed in the analysis of Point I on appeal, there was sufficient evidence to support the conclusion that the provision in the loan agreement prohibiting class

arbitrations was unconscionable. Therefore, Missouri Title Loans' argument fails. Point four is denied.

III. CONCLUSION

The judgment is affirmed.

GLENN A. NORTON, Presiding Judge

Mary K. Hoff, J. and
Lawrence E. Mooney, J., concur